

00-0 -1848

AN ORDINANCE
BY

**AN ORDINANCE AUTHORIZING THE MAYOR TO
EXECUTE AN INTERIM FRANCHISE AGREEMENT WITH
FIBERWORKS, INC. FOR THE PROVISION OF
TELECOMMUNICATIONS SERVICES USING PUBLIC
RIGHT-OF-WAY; AND FOR OTHER PURPOSES**

WHEREAS, Fiberworks, Inc. has applied for a franchise to provide telecommunications services on, under, over and through the public right-of-way of the City; and

WHEREAS, the City intends to enact a comprehensive ordinance governing such use of its right-of-way, pursuant to the federal 1996 Telecommunications act, but wishes to provide access to its right-of-way, on an interim and nondiscriminatory basis; and

WHEREAS, Fiberworks, Inc. has negotiated an interim franchise agreement with the City which provides such access and preserves the rights of the City until such time as a comprehensive ordinance is enacted;

**NOW, THEREFORE THE CITY COUNCIL OF THE CITY OF ATLANTA GEORGIA
HEREBY ORDAINS:**

SECTION 1: That the Mayor be and is hereby authorized to execute an interim franchise agreement in substantially similar form as attached, with Fiberworks, Inc. for use of the public right-of-way for telecommunications purposes.

SECTION 2: That such interim franchise agreement shall expire and terminate on **March 31, 2001.**

SECTION 3: That Fiberworks, Inc. shall pay a franchise fee of three percent (3%) of gross revenues.

SECTION 4: That the City Attorney shall prepare a franchise agreement document, which shall be approved by the city Attorney as to form.

SECTION 5: That said franchise agreement shall not be binding on the City until approved by the Mayor and delivered to Fiberworks, Inc.

OMC - Amendment Incorporated by tcp 12/14/00

A true copy,

Deputy Clerk

**ADOPTED as amended by the Council
APPROVED by the Mayor**

DEC 04, 2000
DEC 12, 2000

.....

INTERIM FRANCHISE AGREEMENT

BETWEEN

THE CITY OF ATLANTA, GEORGIA

AND

FIBERWORKS, INC.

Dated: _____

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INTERIM FRANCHISE AGREEMENT

This **AGREEMENT**, executed as of the ____ day of _____, 1999 (the “Effective Date”), by and between **THE CITY OF ATLANTA, GEORGIA** (hereinafter referred to as the “City”), and Fiberworks, Inc., a corporation duly organized and validly existing under the laws of the State of Delaware, whose principal place of business is located at 241 Ralph McGill Boulevard NE, Atlanta, Georgia 30308-3374 (hereinafter referred to as the “Grantee”).

W I T N E S S E T H:

WHEREAS, the City has the authority pursuant to applicable State and local laws to grant franchises and other authorizations for the use and occupancy of the Streets (as hereinafter defined);

WHEREAS, consistent with applicable law, the City desires to manage the Streets and obtain fair and reasonable compensation from Telecommunications Providers (as hereinafter defined) for the use of the Streets on a non-discriminatory basis;

WHEREAS, the Grantee desires to obtain a franchise to use and occupy the Streets for the purpose of constructing and maintaining a Telecommunications System (as hereinafter defined) and providing Telecommunications Services (as hereinafter defined) on a competitively neutral and nondiscriminatory basis in accordance with the Federal Telecommunications Act of 1996, 47 U.S.C. § 151 et. seq.;

WHEREAS, the City intends to exercise, to the fullest extent permitted by applicable law, its authority with respect to the regulation of the occupation and use of the Streets in connection with the provision of Telecommunication Services;

WHEREAS, the City is considering the adoption of a comprehensive telecommunications ordinance that would, consistent with applicable laws, establish the procedures and requirements for granting franchises for the use of the Streets in connection with the provision of Telecommunications Services (the "Telecommunications Ordinance");

WHEREAS, the Grantee has requested that the City grant it a telecommunications franchise prior to adoption of the Telecommunications Ordinance to permit the Grantee to proceed with the construction of a Telecommunications System;

WHEREAS, in response to the Grantee's request, the City has agreed to grant a telecommunications franchise to the Grantee and enter into this Agreement prior to adoption of the Telecommunications Ordinance; and

WHEREAS, the Grantee understands and acknowledges that if the City adopts the Telecommunications Ordinance, the Grantee shall be subject to the requirements of such ordinance, which requirements shall be in addition to the terms and conditions of this Agreement;

NOW, THEREFORE, in consideration of the foregoing clauses, which clauses are hereby made a part of this Agreement, the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby covenant and agree as follows:

ARTICLE 1.

DEFINITIONS

1.1. Definitions. The following terms, as used in this Agreement, have the following meanings, with all terms defined in this Article 1 in the singular to have the correlative meaning when used in the plural and vice versa:

1.1.01. “Affiliated Person” means each Person who falls into one or more of the following categories: (i) each Person having, directly or indirectly, a Controlling Interest in the Grantee; (ii) each Person in which the Grantee has, directly or indirectly, a Controlling Interest; (iii) each officer, director, joint venturer or joint venture partner of the Grantee; and (iv) each Person, directly or indirectly, controlling, controlled by, or under common Control with, the Grantee; provided that “Affiliated Person” shall in no event mean the City or any creditor of the Grantee solely by virtue of its status as a creditor and that is not otherwise an Affiliated Person by reason of owning a Controlling Interest in, being owned by, or being under common ownership, common management or common Control with, the Grantee.

1.1.02. “Agreement” means this Interim Franchise Agreement, together with all Appendices attached hereto and all amendments or modifications thereto.

1.1.03. “Cable Services” means “cable services” as defined in the Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996 and as may be further amended from time to time (the “Cable Act”). In the event that “cable services” is no longer defined in the Cable Act or the definition in the Cable Act otherwise becomes inapplicable, “Cable Services” shall mean “cable services” as

defined in the Cable Act immediately prior to such term no longer being defined in the Cable Act or such definition otherwise becoming inapplicable.

1.1.04. “City” means the City of Atlanta, Georgia.

1.1.05. “Code” means the Code of Ordinances of the City, as amended from time to time.

1.1.06. “Control” or “Controlling Interest” means actual working control in whatever manner exercised, including, without limitation, working control through ownership, management, debt instruments or negative control, as the case may be, of the Grantee or the Equipment in the Streets. A rebuttable presumption of the existence of Control or a Controlling Interest shall arise from the beneficial ownership, directly or indirectly, by any Person, or group of Persons acting in concert, of more than twenty percent (20%) of any Person (which person or group of Persons is hereinafter referred to as “Controlling Person). “Control” or “Controlling Interest” as used herein may be held simultaneously by more than one Person or group of persons.

1.1.07. “Customer” means any Person who uses the Telecommunications Services of the Grantee in the corporate limits of the City.

1.1.08. “Effective Date” means the date this Agreement was executed as set forth in the opening clause of this Agreement.

1.1.09. “Equipment” means any and all transmission facilities, poles, wires, electrical conductors, conduits, ducts, subways, manholes, fixtures, appliances and appurtenances that are used in connection with the provision of Telecommunications Services.

1.1.10. “FCC” means the Federal Communications Commission.

1.1.11. “Franchise” has the meaning set forth in Section 2.1 of this Agreement.

1.1.12. “Franchise Fee” has the meaning set forth in Section 4.1 of this Agreement.

1.1.13. “GPSC” means the Georgia Public Service Commission.

1.1.14. “Grantee” means Fiberworks, Inc.

1.1.15. “Gross Revenues” means all revenue, as determined in accordance with generally accepted accounting principles and applicable law, that is received, directly or indirectly, by the Grantee and any Affiliated Person from or in connection with the provision of Telecommunication Services over the Grantee’s Telecommunications System in the established corporate limits of the City; provided that, Gross Revenue shall not include any franchise fees or any sales or excise taxes collected for direct pass-through to any entity, other than an Affiliated Person, including any local, state or federal government.

1.1.16. “Performance Bond/Security Fund” has the meaning set forth in Section 9.1 of this Agreement.

1.1.17. “Person” means any individual or any association, firm, partnership, joint venture, corporation or other legally recognized entity, whether for profit or not for profit, but shall not mean the City.

1.1.18. “SEC” means the Securities and Exchange Commission.

1.1.19. “Streets” means the surface of, as well as the spaces above and below, any and all paved or unpaved public roads, as defined in Ga. Code Ann. § 32-1-3(24) (1998), public alleyways and boulevards and other public rights-of-way within or belonging to the City.

1.1.20. “Telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.

1.1.21. “Telecommunications Ordinance” has the meaning set forth in the fifth whereas clause of the preamble to this Agreement.

1.1.22. “Telecommunications Provider” means any Person who:

- (1) owns, constructs, operates or maintains Equipment in the Streets used to provide Telecommunications Services, regardless of whether such Telecommunications Services originate or terminate in the City; or
- (2) provides Telecommunications Services that originate or terminate in the City by means of: (i) specifically identifiable Equipment in the Streets, which Equipment is owned by such Person or made available to such Person under a lease or any other arrangement for a period longer than one hundred twenty 120 days; or
(ii) Equipment in the Streets if the use of such Equipment is continuing and substantial, and the City has determined that it is necessary and appropriate to impose the requirements of the Telecommunications Ordinance in order to preserve the application of the Telecommunications Ordinance on a competitively neutral and nondiscriminatory basis consistent with applicable law.

1.1.23. “Telecommunications Services” means the offering of Telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used, provided, however, that the term “Telecommunications Services” shall not include Cable Services.

1.1.24. “Telecommunications System” means the plant, Equipment, real property (including interests in real property), personal property (tangible and intangible), cable(s), wire(s), optical fibers, amplifier(s), antenna, and all other electronic devices, equipment and facilities used to provide Telecommunications Services to, from, within or across any part of the City.

1.1.25. “Term” has the meaning set forth in Section 2.2 of this Agreement.

ARTICLE 2.

GRANT OF AUTHORITY

2.1. Grant of Franchise. The City hereby grants the Grantee, subject to the conditions of this Agreement, a franchise (the “Franchise”) to occupy and use the Streets to construct, install, operate, upgrade, repair, maintain and remove Equipment used to provide Telecommunications Services upon, along, over and under the Streets.

2.2. Term of Franchise. The Franchise commences on the Effective Date and expires on December 31, 2000, unless the Franchise is renewed as provided in Section 2.4, or terminated as provided in Section 11.1, of this Agreement. The period of time that the Franchise is in effect is referred to as the “Term.”

2.3. Nonexclusive Franchise. Nothing in this Agreement affects the right of the City to grant any other Person a franchise to occupy and use the Streets to construct, install, operate,

upgrade, repair, maintain and remove Equipment used to provide any Telecommunications Services, or to engage in any other activity in the Streets. Nothing in this Agreement affects the right of the City to occupy and use the Streets to construct, install, operate, upgrade, repair, maintain and remove Equipment used to provide any Telecommunications Services, or to engage in any other activity in the Streets, provided such occupancy and use or other activity does not interfere unreasonably with the rights granted to Grantee herein.

2.4. Renewal. The Grantee may submit a written petition to renew the Franchise, not later than six (6) months nor more than twelve (12) months prior to the end of the Term. The City is not obligated to renew the Franchise, and the Grantee has no right to renewal of the Franchise.

2.5. Public Works and Public Improvements. Nothing in this Agreement abrogates the right of the City to perform any public works or public improvements. If Equipment interferes with the construction, installation, operation, maintenance, repair or removal of such public works or public improvements, the Grantee, at its own expense, shall, promptly after receipt of notice of such interference from the City, protect, alter or relocate such Equipment, as directed by the City. If the Grantee refuses or neglects to so protect, alter or relocate said Equipment within a reasonable time, the City may break through, remove, alter or relocate the Equipment without any liability to the Grantee, and the Grantee shall pay to the City the reasonable costs incurred in connection with such breaking through, removal, alteration or relocation. The City and its officers, employees, agents, attorneys, consultants and independent contractors shall not have any liability to the Grantee for any damage as a result of, or in connection with, such public works or public improvements.

2.6. Regulatory Approvals. The Grantee shall obtain all necessary approvals, licenses, permits or other authorizations from the appropriate federal, state and local authorities to offer Telecommunications Services through the Equipment, and shall, upon the City's request, submit evidence of such approvals to the City.

2.7. Street Closings. Nothing in this Agreement waives or releases the rights of the City in and to the Streets. If all or part of the Streets are eliminated, closed or abandoned, the Franchise shall cease with respect to such Streets upon the effective date of the final action of the City in connection therewith. If the elimination, closing or abandonment of all or part of the Streets is undertaken for the benefit of any private Person, the City shall make reasonable efforts to condition its consent to the elimination, closing or abandonment on the agreement of the private Person to (i) grant the Grantee the right to continue to occupy and use the Streets, or (ii) reimburse the Grantee for the reasonable costs of relocating the affected Equipment.

2.8. Lease of Excess Capacity. The City may request that the Grantee lease any excess capacity contained in its Telecommunications System to one or more Non-Affiliated Persons. Upon receipt of any such request from the City, the Grantee will review the capacity then available on the system and the Grantee's future plans for its use. Should the Grantee determine that (i) excess capacity then exists, (ii) there are no plans for immediate or future use of such excess capacity, and (iii) the proposed use of said excess capacity by such Non-Affiliated Person is feasible, then the Grantee may lease the excess capacity in accordance with the City's request; provided such an arrangement will not interfere with the operation of the Grantee's Telecommunication System in the manner intended by the Grantee; and provided further, that said Non-Affiliated Person(s) agree(s) to compensate the Grantee for the reasonable value thereof in accordance with Section 138-131(b) of the Code.

ARTICLE 3.

SERVICES

3.1. No Discrimination. The Grantee shall not discriminate in the provision of Telecommunications Services on the basis of race, creed, color, national origin, sex, age, handicap, marital status or sexual orientation.

3.2. Uses of Equipment. On May 1 of each year throughout the Term, the Grantee shall provide annually to the City a detailed description of the uses of the Equipment and the categories of users during the previous twelve (12) months. The description shall be in a form and provide sufficient detail to allow the City to identify the categories of uses over, on and through the Equipment.

ARTICLE 4.

COMPENSATION AND OTHER PAYMENTS

4.1. Franchise Fee. As compensation for the rights granted herein, the Grantee shall pay three percent (3%) of Gross Revenues to the City as a "Franchise Fee." The Grantee's obligation to pay the Franchise Fee shall commence on the Effective Date and continue throughout the Term. Franchise Fee payments shall be made quarterly on or before thirty (30) days after the quarters ended on the last day of each March, June, September and December throughout the Term. In the event the Term commences or expires on a day other than the first or last day of a calendar quarter, the Franchise Fee shall be prorated relative to the number of days in the quarter that the Franchise is in effect.

4.2. Franchise Application and Acceptance Fees. The City hereby acknowledges receipt of a non-refundable application fee of Five Hundred Dollars (\$500.00) upon receipt of

the Grantee's request for a Franchise, and further acknowledges the payment by the Grantee, contemporaneously with the execution of this Agreement, of the amount of Ten Thousand Dollars (\$10,000.00) to the City for reimbursement of costs incurred by the City in connection with the grant of the Franchise. The fees required by this Section 4.2 shall not be applied to, offset against or deducted from any franchise fees or other payments required by this Agreement.

4.3. Payment Credits and Deductions. The compensation and other payments to be made pursuant to this Article 4 shall not be deemed to be in the nature of a tax, and shall be in addition to and not in lieu of any business licenses, permit fees for work in the Streets, special taxes on poles or conduits, and any other fees or charges that the Grantee shall be required to pay to the City or to any state or federal agency or authority. There shall be no deduction allowed for ad valorem taxes against the Franchise Fee or other payments or fees required by this Agreement.

4.4. Interest on Late Payments. If any payment required by this Agreement is not actually received by the City or the Grantee, as the case may be, on or before the applicable due date fixed in this Agreement, the City or the Grantee, as appropriate, shall pay interest thereon, from the due date to the date paid, at a rate equal to the rate of interest then charged by the City for late payments of real estate taxes pursuant to Ga. Code Ann. § 48-2-40 (1998).

4.5. Reservation of Rights. Except as otherwise provided herein, no acceptance of any Franchise Fee payment by the City shall be construed as an accord and satisfaction that the amount paid is in fact the correct amount; nor shall such acceptance of any payment be construed as a release of any claim that the City may have for further or additional sums payable under the provisions of this Agreement. All amounts paid shall be subject to audit and recomputation by

the City, provided that any such audit and recomputation is completed by the City within five (5) years of the date on which the payment in question was made to the City and is performed in accordance with Section 7.6.

4.6. Remedy for Underpayment. If, as a result of an audit or any other review, the City determines that the Grantee has underpaid Franchise Fees in any twelve-month period by ten percent (10%) or more, then, in addition to making full payment of the relevant obligation, including interest as described in Section 4.4 of this Agreement, the Grantee shall reimburse the City for all of the reasonable costs associated with the audit or review, including all reasonable out-of-pocket costs for attorneys, accountants and other consultants.

4.7. Continuing Obligation and Holdover. If the Grantee continues to use Equipment in the Streets to provide Telecommunications Services after the Term, then the Grantee shall continue to comply with all applicable provisions of this Agreement, including, without limitation, all compensation and other payment provisions of this Agreement, throughout the period of such continued operation; provided that any such continued operation shall in no way be construed as a renewal or other extension of this Agreement or the Franchise, nor as a limitation on the remedies, if any, available to the City as a result of such continued operation after the Term, including, but not limited to, damages and restitution. If this Agreement terminates for any reason whatsoever and the Grantee fails to cease using Equipment in the Streets to provide Telecommunications Services, the City, in addition to all other remedies available to it under this Agreement or by law, shall be entitled to receive all payments it is entitled to receive under this Agreement, including, but not limited to, the compensation set forth in Section 4.1 of this Agreement.

ARTICLE 5.

CONSTRUCTION-RELATED REQUIREMENTS

5.1. Quality. All work involved in the construction, installation, operation, upgrade, repair, maintenance and removal of Equipment shall be performed in a safe, thorough and reliable manner, using materials of good and durable quality. If it is determined by the City or any other agency or authority of competent jurisdiction, at any time, that any Equipment is harmful to the health or safety of any Person, then the Grantee shall, at its own cost and expense, promptly correct all such harmful conditions.

5.2. Liability Limitation. Neither the City nor its officers, employees, agents, attorneys, consultants or independent contractors shall be responsible to the Grantee or any Affiliated Person for any liability as a result of or in connection with the protection, breaking-through, movement, removal, alteration or relocation of any Equipment by or on behalf of the Grantee or the City in connection with any emergency, public work, public improvement, alteration of any municipal structure, any change in the grade of line of any Street, or the elimination, discontinuation and closing of any Street, as provided in this Agreement.

5.3. New Grades or Lines. If the grades or lines of any Street are changed at any time during the Term, then the Grantee shall, at its own cost and expense and upon the request of the City, after reasonable notice to the Grantee, protect or promptly alter or relocate Equipment, within a reasonable time after notice, so as to conform with such new grades or lines. If the Grantee refuses or neglects to so protect, alter, or relocate Equipment, the City shall have the right to break-through, remove, alter or relocate such Equipment without any liability to the Grantee and the Grantee shall pay to the City the costs incurred in connection with such breaking-through, removal, alteration or relocation.

5.4. Protection of Streets. In connection with the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment, the Grantee shall, at its own cost and expense, protect the Streets and any structures thereon, thereunder or thereover, and shall, except in an emergency, obtain the prior approval of the City before altering the Streets or any such structures. Any such approved alteration shall be made by the Grantee, at its sole cost and expense, in the manner reasonably prescribed by the City, if any. The Grantee shall be liable, at its own cost and expense, to replace or repair, in accordance with existing standards of the City in effect at the time of the work, any Street or structure thereon, thereunder or thereover that may become disturbed or damaged as a result of the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment. The Grantee shall warrant any such replacement or repair for one (1) year. If the Grantee does not commence such replacement or repair within a reasonable time after notice, the City or the owner of the affected structure may make such replacement or repair and the Grantee shall pay the actual cost incurred by the City for same within thirty (30) days of its receipt of the City's invoice therefor.

5.5. No Obstruction. In connection with the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment, the Grantee shall not, except in an emergency, obstruct the sidewalks, streets, subways, railways, rivers or other traffic to, from or within the corporate limits of the City without the prior consent of the City, which consent shall not be unreasonably withheld. Equipment of the Grantee in the Streets shall be located so as to cause minimum interference with the lawful use of the Streets and adjoining property by other Persons.

5.6. No Interference. In the provision of Telecommunications Services, the Grantee shall, to the extent not prevented by an emergency, provide its Telecommunications Services

within the corporate limits of the City in such a manner that the operation of its Telecommunications System shall not interfere with other lawful, permitted uses of the Streets.

5.7. Underground Utilities. The Grantee shall comply with any current or future City ordinances requiring the placement of Equipment underground.

5.8. Moving Equipment. The Grantee shall, upon prior written notice by the City or any Person holding a permit to move any structure, and within the time that is reasonable under the circumstances, temporarily move Equipment to permit the moving of said structure. The Grantee may impose a reasonable charge on any Person other than the City for any such movement of its Equipment.

5.9. Safety Precautions. The Grantee shall, at its own cost and expense, undertake all reasonable and appropriate efforts to prevent accidents at its work sites, including the placement and maintenance of proper guards, fences, barricades, watchmen and suitable and sufficient lighting.

5.10. Moving Wires. The City may, at any time and in accordance with applicable law, in case of fire, disaster or other emergency, as determined by the City in its sole discretion, cut or move Equipment as and to the extent necessary to contain or alleviate the harm threatened by the emergency at hand and/or to repair any damage to the Streets resulting therefrom, in which event the City shall not incur any liability to the Grantee or any Affiliated Person. When possible, the Grantee shall be consulted prior to any such cutting or movement of Equipment and shall be given the opportunity to perform such work itself. All costs to repair or replace such Equipment shall be borne by the Grantee.

5.11. Pole Space and Conduit Space. The Grantee and the City shall enter into agreements from time to time for the reciprocal use of the poles of each by the other; provided (i) such use by the City of the Grantee's poles and conduits shall not interfere with the proper use thereof by the Grantee for its purposes or in the exercise of the rights granted to it by this Franchise; (ii) such use by the Grantee of the City's poles shall not interfere with the proper use thereof by the City for its purposes or in the exercise of its functions; and (iii) each shall indemnify, keep and hold the other harmless from any and all loss, damage, cost or expense to or, that may be incurred by either or to which either may be subjected by reason or as a result of such use and occupancy of their respective poles.

5.12. Trimming of Trees. The Grantee's maintenance of its Telecommunications System, including the trimming of any vegetation, trees or shrubbery so as to prevent the branches of trees or other vegetative growth from coming in contact with the wires, cables or other facilities of the Grantee or from preventing the Grantee's access to its facilities, shall be conducted in compliance with the City's ordinances for Tree Protection, presently codified in Chapter 158, Article II of the Code, and in observance of private property rights. The Grantee shall obtain the approval of the City's Arborist prior to conducting any trimming activity on or in the Streets and shall remove any trimmings on or in the Streets within twenty-four hours after being cut. Should the Grantee, its contractor or agent fail to remove such trimmings promptly, the Grantee shall reimburse the City for the City's costs in effecting such removal, upon receipt of the City's invoice.

5.13. Employee Discrimination Ban. The Grantee shall comply in all respects with all applicable federal, state and local employment discrimination laws and requirements during the Term. The Grantee shall not: (i) refuse to hire, train or employ; (ii) bar or discharge from

employment; or (iii) discriminate against any individual in compensation, hours of employment or any other term, condition or privilege of employment, including, without limitation, promotion, upgrading, demotion, downgrading, transfer, layoff and termination, on the basis of race, creed, color, national origin, sex, age, handicap or marital status.

5.14. Equal Business Opportunity Requirements. It is the policy of the City to actively promote full and equal business opportunities for minority and female business enterprises through the City's Equal Business Opportunity Program. The purpose of the Equal Business Opportunity Program is to mitigate the present and ongoing effects of past and present discrimination against female and minority-owned businesses so that opportunity, regardless of race or gender, will become institutionalized in the City. The provisions of the City's Equal Business Opportunity Program are outlined in Part 2, Division 12 of the Code. The Grantee agrees that it will abide by these provisions.

The Grantee understands that under the terms and conditions of this Agreement and the above-referenced Code provisions, the City expects all construction-related activity, that is a result of this Franchise Agreement, to include participation by minority and female-owned businesses. The Grantee acknowledges and agrees that the minority and female participation construction goals that the City expects the Grantee to meet in connection with the construction of its Telecommunications System are:

African American Business Enterprises	30%
Female Business Enterprises	3%
Hispanic Business Enterprises	3%
Asian Business Enterprises	1%

ARTICLE 6.

[RESERVED]

ARTICLE 7.

OVERSIGHT AND REGULATION

7.1. City's Right of Oversight. The City has the right to oversee, regulate and inspect the construction, installation, operation, upgrade, repair, maintenance and removal of Equipment in the Streets and the provision of Telecommunications Services through Equipment in accordance with the provisions of this Agreement and applicable law. The City reserves the right to adopt or issue, in accordance with applicable law, such rules, regulations, orders or other directives governing the Grantee, the Equipment or the Grantee's Telecommunications System as it shall find necessary or appropriate in the exercise of its police power or pursuant to and in furtherance of the purposes of this Agreement. The Grantee expressly agrees to comply with all such valid rules, regulations, orders or other directives. No rule, regulation, order or other directive issued pursuant to this Section 7.1 shall constitute an amendment to this Agreement.

7.2. Permits. The Grantee shall obtain all construction, building or other permits or approvals necessary before constructing, installing, operating, upgrading, repairing, maintaining or removing Equipment. Nothing in this Agreement waives any of the City's ordinances or regulations, or the City's right to require the Grantee and its Customers to secure appropriate permits or approvals for use of Telecommunications Services. Any fees that the City charges to the Grantee, Affiliated Persons or its Customers to issue permits or approvals shall not be offset against the compensation or other payments that the Grantee is required to pay to the City pursuant to this Agreement.

7.3. Managerial and Operational Standards. The Grantee shall establish and maintain such managerial and operational standards, procedures, records and controls as shall be required to enable the Grantee to be, at all times throughout the Term, in compliance with each material term and condition of this Agreement and to ascertain promptly any failure to be in compliance with each such term or condition.

7.4. Reports. At the request of the City, the Grantee shall promptly submit to the City such information regarding the Grantee and any Affiliated Person as the City may require, and to which the City is legally entitled, to verify compliance with any term or condition of this Agreement.

7.5. Books and Records. Throughout the Term, the Grantee shall maintain in the City, or make available in the City within a reasonable time of the City's request therefor, complete and accurate books of account and records of the business, ownership and operations of the Grantee with respect to the Equipment and Telecommunications Services provided therewith, including without limitation, books of account and records adequate to enable the Grantee to demonstrate, at all times throughout the Term, that it is, and has been, in compliance with each term and condition of this Agreement. Each document pertaining to financial matters that may be the subject of an audit by the City shall be retained by the Grantee for a minimum of four (4) years following the date on which such document was created. Should the City reasonably determine that the records are not being maintained in a manner that enables the Grantee to demonstrate at all times throughout the Term that it is, and has been, in compliance with each term and condition of this Agreement, the Grantee shall, unless otherwise prohibited by applicable law or commercial impracticability, alter the manner in which the books and records are maintained so that the Grantee comes into compliance with this Section 7.5.

7.6. Right of Inspection. The City and its designated representatives shall have the right to inspect, examine and audit, during normal business hours and upon reasonable advance notice to the Grantee, such required notice not to exceed one hundred twenty (120) days subject to extensions requested by the Grantee upon reasonable grounds, all documents, records and other information of the Grantee and any Affiliated Person that pertain to the Equipment, the Telecommunications System and the Telecommunications Services provided in the City, and the Grantee's employment practices in connection therewith. Upon request by the City, all such documents, records and other information shall be made available within the corporate limits of the City in order to facilitate the inspection, examination or audit. Further, during normal business hours and upon reasonable notice to the Grantee, the City and its designated representatives may inspect and examine any other aspect of the Equipment and the Telecommunications System as necessary to confirm compliance by the Grantee with the terms and conditions of this Agreement.

7.7. Treatment of Proprietary Information. Access by the City to any of the documents, records or other information covered by this Article 7 shall not be denied on grounds that such documents, records or information contain proprietary information. The Grantee may label any document, record or other information as proprietary or confidential if it considers it such. The labeling of documents, records or other information as proprietary or confidential shall be the sole responsibility of the Grantee. The City shall maintain the confidentiality of the Grantee's documents, records or other information disclosed to the extent allowed by law. In the event the City intends to release any document, record or other information that has been labeled confidential by the Grantee pursuant to the Georgia Open Records Act, Ga. Code Ann. §§ 50-18-70 to -76 (1998), or otherwise in accordance with applicable law, the City shall

provide written notice to the Grantee not less than three (3) business days prior to any such proposed release. The Grantee shall be entitled to assume and prosecute the defense against any such release with counsel of its own choosing at its sole cost and expense.

7.8. Compliance Audits and Public Hearings. The City may conduct compliance audits and/or hold public hearings with respect to matters covered in this Agreement at any time during the Term, provided that the City gives the Grantee written notice thirty (30) days in advance of the commencement of any such compliance audits and/or public hearings and provided that such audits and/or hearings shall not occur more frequently than every two (2) years.

7.9. Installation Report. Upon request by the City, which shall not be repeated within any twelve-month period, the Grantee shall provide to the City a report describing any installation or upgrade of Equipment by the Grantee in the Streets during the previous twelve (12) months. The report also shall describe the Grantee's reasonably anticipated plans for such installation and upgrade for the coming twelve (12) months. Notwithstanding the requirements of this Section 7.9, the Grantee shall provide to the City, upon the City's request, any additional information that the City reasonably deems necessary during the Term to ensure compliance with the terms of this Agreement.

7.10. Additional Filings. The Grantee shall provide annually to the City a list of any and all material communications, public reports, petitions or other filings submitted by the Grantee to any local, state or federal agency or official (and any response thereto received by the Grantee) that in any way materially affects adversely the Grantee's ability to adhere to the terms of this Franchise Agreement or to operate the Equipment or the Telecommunications Services

provided therewith, but not including any tax returns or other filings that are confidential. Upon the request of the City, the Grantee shall promptly, but in no case later than ten (10) business days following the request, deliver to the City a complete copy of any item on said list.

7.11. Nonperformance Penalties. If any of the following events occur, the City, at its discretion, may impose on the Grantee a penalty up to a maximum of one thousand dollars (\$1,000.00) per occurrence, which penalty is in addition to any other penalties or remedies available to the City under this Agreement and any other laws, ordinances and regulations:

7.11.01. Equipment is constructed, installed, operated, upgraded, repaired, maintained or removed in/from the Streets without appropriate permits and other regulatory approvals having been obtained from the City, as required by Section 7.2 of this Agreement.

7.11.02. Sidewalks, streets, subways, railways, rivers or other traffic to, from or within the corporate limits of the City are obstructed without permission having been obtained from the City, as required by Section 5.5 of this Agreement.

7.11.03. Structures in the Streets are altered without City approval or not protected, as required by Section 5.4 of this Agreement.

ARTICLE 8.

LIABILITY AND INSURANCE

8.1. Insurance -- Specifications. Throughout the Term, the Grantee shall, at its own expense, maintain General Liability and Workers Compensation insurance policies, respectively, (i) in the minimum combined amount of one million dollars (\$1,000,000) for bodily injury, personal injury and property damage, and (ii) in conformance with State of Georgia statutory requirements, in a form reasonably acceptable to the City. Such policies shall be issued by

companies duly licensed to do business in the State of Georgia, carrying a rating by Best of not less than “A” and reasonably acceptable to the City. Such policy or policies shall insure both (i) the Grantee, and (ii) the City and its officers, boards, commissions, councils, elected officials, agents and employees (through appropriate endorsements if necessary). The foregoing minimum limitation shall not prohibit the Grantee from obtaining a liability insurance policy or policies in excess of such limitations, provided that the City, its officers, boards, commissions, councils, elected officials, agents and employees shall be named as additional insureds to the full extent of any limitation contained in any such policy or policies obtained by the Grantee.

8.2. Insurance -- Maintenance. The insurance policies required in Section 8.1 shall be maintained by the Grantee throughout the Term and such other period of time during which the Grantee operates or is engaged in the removal of Equipment. Each such liability insurance policy shall contain an endorsement substantially in the form of the following:

It is hereby understood and agreed that this policy may not be canceled, nor the intention not to renew be stated, until thirty (30) days after receipt by the City of a written notice of such intent to cancel or not to renew.

Prior to any such cancellation, the Grantee shall obtain and furnish to the City replacement insurance policies in a form reasonably acceptable to the City.

8.3. Increased Insurance Coverage. In the event of any changed circumstances following the Effective Date that result in a measurable increased risk of loss or damage in excess of the amounts provided for in Section 8.1, above, the City, after consulting with the Grantee, may alter the minimum limitation of the liability insurance policy or policies required in Section 8.1 as required to cover such potentially increased loss or damage exposure.

8.4. Liability Not Limited. The legal liability of the Grantee to the City and any Person for any of the matters that are the subject of the liability insurance policies required by Section 8.1, including, without limitation, the Grantee's indemnification obligations set forth in this Agreement, shall not be limited by such insurance policies nor by the recovery of any amounts thereunder, except to the extent necessary to avoid duplicative recoveries from or payments by the Grantee.

8.5. Liability of Grantee. The Grantee shall be responsible for any liability, including, without limitation, any liability of the City and any Person, including, without limitation, any officer, employee, agent, attorney, consultant and independent contractor of the City, arising out of or in connection with the Grantee's acts or omissions with respect to the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment by the Grantee, or the provision by the Grantee of Telecommunications Services through the Equipment. The Grantee shall, at its own cost and expense, replace, repair or restore any property damaged in connection with the performance of any of the foregoing activities to its prior condition and shall pay appropriate compensation in the event of any injury to or death of any Person occasioned by any act or failure to act of the Grantee, any Affiliated Person, or any officer, employee, agent or subcontractor thereof, in connection with the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment or the provision of Telecommunications Services through the Equipment.

8.6. Liability of City. The City, its officers, employees, agents, attorneys, consultants and independent contractors shall not be responsible for any acts or omissions of the Grantee, any Affiliated Person or any other Person, arising out of or in connection with the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment or

the provision of Telecommunications Services through the Equipment. The City and its officers, employees, agents, attorneys, consultants and independent contractors shall have no liability to the Grantee, any Affiliated Person or any other Person for any special, incidental, consequential, punitive, or other damages as a result of the exercise of any right of the City pursuant to this Agreement or applicable law, including, without limitation, the rights of the City to approve or disapprove the grant, termination, amendment, renewal or transfer of the Franchise, or to otherwise modify all or any part of this Agreement or the Franchise.

8.7. Indemnification of City. The Grantee and each Affiliated Person shall defend, indemnify and hold harmless the City, its officers, employees, agents, attorneys, consultants and independent contractors from and against all liabilities, whether special, incidental, consequential or punitive, and all other damages, costs and expenses (including reasonable attorneys' fees) arising out of or in connection with the award of this Franchise, the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment or the provision of Telecommunications Services through the Equipment. The Grantee and each Affiliated Person also shall cooperate with the City by providing such nonfinancial assistance as reasonably may be requested by the City in connection with any claim arising out of or in connection with the selection of franchisees for, or the negotiation or award of, a Franchise or this Agreement.

8.8. Limitation. As between the City and the Grantee or any Affiliated Person, the liability and indemnity obligations of the Grantee pursuant to Sections 8.5, 8.6 and 8.7 of this Agreement shall not apply to any willful misconduct or gross negligence of any City officer, employee, agent, attorney, consultant or independent contractor.

RCS# 2482
12/05/00
12:38 AM

Atlanta City Council

Regular Session

MULTIPLE

Items 2 & 3; 00-O-1847 & 00-O-1848

ADOPT AS AMEND

YEAS: 10
NAYS: 3
ABSTENTIONS: 0
NOT VOTING: 2
EXCUSED: 0
ABSENT 1

Y McCarty	Y Dorsey	N Moore	B Thomas
N Starnes	Y Woolard	Y Martin	NV Emmons
Y Bond	N Morris	Y Maddox	Y Alexander
Y Winslow	Y Muller	Y Boazman	NV Pitts

MULTIPLE

LARGE ATTACHMENT:

DOCUMENT(S),

MANUAL(S)

OR

MAP(S)

NOT COPIED,

PULL ORIGINAL

FOR COPY OR TO VIEW

00-0-1848

(Do Not Write Above This Line)

AN ORDINANCE

BY

AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE AN INTERIM FRANCHISE AGREEMENT WITH FIBERWORKS, INC. FOR THE PROVISION OF TELECOMMUNICATIONS SERVICES USING PUBLIC RIGHT-OF-WAY: AND FOR OTHER PURPOSES.

11/20/00

1st Adoption
& Referred

ADOPTED BY

NOV 20 2000

COUNCIL

ADOPTED BY

DEC 04 2000

COUNCIL

AS AMENDED

- ☐ CONSENT REFER
- ☐ REGULAR REPORT REFER
- ☐ ADVERTISE & REFER
- ☐ 1st ADOPT 2nd READ & REFER
- ☒ PERSONAL PAPER REFER

Date Referred

11/6/00

Referred To:

City Utilities

Date Referred

11/20/00

Referred To:

City Utilities

Date Referred

Referred To:

First Reading

Committee _____
Date _____
Chair _____
Referred to _____

Committee City Utilities
Date 11-14-00
Chair Clara Muller
Action: _____
Fav, Adv, Hold (see rev. side) _____
Other: 2nd Reading, 1st Adoption
Members John K. Starnes
[Signature]
Refer To _____

Committee City Utilities
Date 11-28-00
Chair Clara Muller
Action: _____
Fav, Adv, Hold (see rev. side) _____
Other: 3rd Reading, Final Adoption
Members John K. Starnes
[Signature]
Refer To _____

FINAL COUNCIL ACTION

- ☒ 2nd
- ☐ 1st & 2nd
- ☐ 3rd
- Readings
- ☐ Consent
- ☐ V Vote
- ☒ RC Vote

CERTIFIED

CERTIFIED
DEC 4 2000

ATLANTA CITY COUNCIL PRESIDENT

[Signature]

CERTIFIED
DEC 04 2000

[Signature]
ATLANTA CITY COUNCIL CLERK

MAYOR'S ACTION

APPROVED

DEC 12 2000

MAYOR

[Signature]